INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Argument	6
I. The Decision Below Is Clearly Correct	6
A. The Real Question Is Whether Petitioner Consented to the Summary Jurisdiction of the Court of Bankruptcy	6
B. Consent by Filing Claims	7
C. Consent by Proceedings on the Merits	8
II. There Is No Conflict of Decisions	11
III. There Is No Important Question of Federal Law	12
A. Petitioner's Questions 1, 2, and 3, Are Based on False Premises	12
B. Petitioner's Question 6 Is Based on a False Implication	14
Conclusion	17
Appendix	19

CITATIONS.

Cases:

Alexander v. Hillman, 296 U. S. 222 (1935) 7

Ex Parte Baldwin, 291 U. S. 610, 617 (1934) 11

Chase National Bank v. Lyford, 147 F. 2d 273 (C. C. A. 2, 1945) 7

Cline v. Kaplan, 323 U. S. 97 (1944) 11, 12

Columbia Foundry Co. v. Lochner, 179 F. 2d 630, 14 A. L. R. 2d 1349 (C. A. 4, 1950) 7

Florance v. Kresge, 93 F. 2d 784 (C. C. A. 4, 1938) ... 8

Giffin v. Vought, 175 F. 2d 186 (C. A. 2, 1949) 8

In re Gillespie Tire Co., 54 F. Supp. 336 (D. C., W. D. S. Car., 1942) 8

In re Monongahela Rye Liquors, Inc., 141 F. 2d 864 (C. C. A. 3, 1944) 8

In re Nathan, 98 F. Sup. 686 (D. C., S. D. Calif., 1951) 8

In re Park Beach Hotel Bldg. Corp., 96 F. 2d 886 (C. C. A. 7, 1938); cert. den. sub nom.-Pancoe v. Southam, 305 U. S. 638 (1938) 8

In re Solar Mfg. Co. — F. 2d — (C. A. 3, December 3, 1952) affirming 102 F. Supp. 859 (D. C., N. J., 1952) 7

Statutes:

Bankruptcy Act [Title 11, U. S. Code, Sec. 1 et seq.] as Amended by Public Law 456, 82d Congress, 2d Session [Act of July 7, 1952, Sec. 1, et seq.] 3, 6, 9, 11, 12, 14

Title 28, U. S. Code, Sec. 1332 6

Title 28, U. S. Code, Sec. 1391 (a) 6

CITATIONS (Continued).

Miscellaneous:

2 Collier on Bankruptcy (14th ed.):
- par. 23.08[5] pages 528-530 11
- par. 23.08[4] page 523-9 9
- par. 23.08[6] pages 530-532 8

4 Collier on Bankruptcy, (14th ed.) par. 68.20, pages 785-790 8

Federal Rules of Civil Procedure:
- Rule 7(a) 10
- Rule 12(a) 10
- Rule 13(a) 9

General Orders in Bankruptcy:
- No. 37 9
- No. 38 9

Oglebay, "Some Developments in Bankruptcy Law Regarding Summary Jurisdiction and the Determination and Effect of Discharges" (1946) 21 J. of Nat'l. Ass'n. of Ref. 18, 19 8

IN THE

Supreme Court of the United States.

October Term, 1952.

No. 395.

JAMES A. VAUGHAN,
Petitioner,

v.

PETROLEUM CONVERSION CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The findings of fact, conclusions of law, and opinion, filed July 6, 1950, and amended and refiled July 7, 1950, in the U. S. District Court for the District of Delaware by the Referee in Bankruptcy (R. 41-56) is not reported. The opinion on petitioner's protest against the exercise of summary jurisdiction filed July 14, 1950, in the District Court by the Referee (R. 58-60) is not reported. The memorandum and order refusing rehearing filed October 20, 1950, in the District Court by the Referee (R. 95-103) is not reported. The opinion on petitioner's petition for review filed August 24, 1951, in the District Court by District Judge Paul Leahy (R. 65-77) is reported at 99 F. Supp. 899. The opinion on appeal filed May 16, 1952, in the Court of Appeals for the Third Circuit per curiam (R. 110-111) is reported at 196 F. 2d 728.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 16, 1952 (R. 111). On August 12, 1952, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to and including August 23, 1952 (R. 113). On August 22, 1952, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to and including October 13, 1952 (R. 113).

QUESTIONS PRESENTED.

1. Does the filing by a supposed creditor of a claim in bankruptcy proceedings constitute consent to the summary jurisdiction of the court of bankruptcy to determine a counterclaim filed by the trustee arising out of the same subject matter as the claim, and to enter an affirmative money judgment on the counterclaim in favor of the bankrupt estate?

2. If the filing of such a claim does not constitute such consent, does such supposed creditor's proceeding on the merits of the counterclaim without objection until after the referee has reached and announced his decision, but before formal judgment has been entered thereon, constitute such consent?

These two questions are more precise statements of petitioner's questions 4 and 5. His questions 1, 2, and 3, are based on false statements of what took place at a meeting of creditors; while his question 6 is based on the false implication that there was a previous final determination in another action of the question involved in this action.

STATUTES INVOLVED.

Section 2(b) of the Act of July 7, 1952, [Public Law 456, 82d Congress, 2d Session] enacts into positive statutory law the rule for which respondent has successfully contended in the courts below.

This Act is pertinent although not controlling, and is reproduced in an appendix hereto, infra page 19.

Portions of the committee reports relating thereto likewise are reproduced in the appendix, infra pages 20-23.

STATEMENT OF THE CASE.

This petition is by a claimant in bankruptcy proceedings seeking review of an affirmative money judgment entered against him in favor of the bankrupt estate on a counterclaim filed by the trustee and arising out of the same subject matter as the claim.

Prior to its adjudication as a bankrupt, James A. Vaughan had been vice-president and a director of, and an attorney for, Petroleum Conversion Corporation ("PCC"). During the period 1944-1948 he was paid $13,250.00 by it for services as vice-president; during the period 1938-1948 he was paid $42,724.62 by it for services as an attorney.

Vaughan filed two claims. One claim was for $318.00 for money loaned to bankrupt. The other claim was for $2,000.00 for an unpaid retainer for legal services for six and two-thirds months prior to the filing of the voluntary petition in bankruptcy.

The trustee filed objections to the claims on the bases (a) that the bankrupt had and would assert a counterclaim or set-off, (b) that Vaughan was disqualified from receiving compensation for legal services because he had and served conflicting interests, and (c) that the amount claimed was far in excess of the value of the alleged services rendered, which the trustee stated he believed were valueless.

In the so-called Dickinson-Rinke litigation, PCC asserted a cause of action growing out of frauds perpetrated by Dickinson and one Lloyd in 1926 prior to the formation of PCC.

On April 14, 1942, Vaughan and one Burnham intervened in that litigation, on their own behalf and on behalf of a class of individuals known as the Rinke Agency Subscribers, some, but not all, of whom were owners of the equity in PCC (R. 7); and asserted the same cause of action as PCC. Vaughan and Burnham were subscribers to the Rinke Agency. Vaughan appeared as attorney for the intervenors, including himself (R. 46-48).

The gist of the trustee's set-off and counterclaim (R. 39) filed October 3, 1949 (R. 102) was that Vaughan disqualified himself by his adverse intervention and appearance from receiving a fee from PCC for legal services.

The Referee epitomizes the basis for his decision in the following portion of his original opinion (R. 54):

> "Initially it may be true that PCC conceived itself as responsible for initiating and conducting the Dickinson-Rinke Litigation, for the purpose of obtaining redress for the Rinke agency subscribers on the wrongs done them by Dickinson and Lloyd. The corporation may have been misadvised on this. There came a time however when the company's directors and officers—and particularly Mr. Vaughan realized that PCC had little if any basis for asserting a corporate wrong against Dickinson and Lloyd for what had been done by them as against the Rinke agency subscribers.
>
> "While there was this period of indecision and perhaps doubt considerable money of PCC was spent in the litigation. Mr. Vaughan, it appears, was the beneficiary for much of this money. So long, therefore, as the claimant acted for the corporation in the Dickinson-Rinke litigation, undoubtedly, he was entitled to compensation from the corporation for his work, and I have so held by Conclusion of Law #4, *supra.*
>
> "When, however, the claimant intervened on April 14, 1942, in the Dickinson-Rinke Litigation for himself and others possessing interests adverse to the corporation I was forced to hold he was no longer entitled to take compensation from PCC, and when he did so he perpetrated a series of diversions of corporate funds and he must pay this back."

ARGUMENT.

I. The Decision Below Is Clearly Correct.

A. *The Real Question Is Whether Petitioner Consented to the Summary Jurisdiction of the Court of Bankruptcy.*

There can be no doubt that the U. S. District Court for the District of Delaware would have had diversity *jurisdiction* of a plenary suit brought against petitioner. Title 28, U. S. Code, Sec. 1332.

The *venue* of that court would have been proper as Delaware was PCC's state of incorporation. Title 28, U. S. Code, Sec. 1391(a).

Under Section 2a(15) of the Bankruptcy Act [Title 11, U. S. Code, Sec. 1 et seq.] a "court of bankruptcy" has jurisdiction to:

> "Make such orders, issue such process, *and enter such judgments,* in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title." [Emphasis supplied.]

Section 2a(7) of the Bankruptcy Act provides inter alia that the "court" shall cause estates of bankrupts to be collected and determine controversies with respect thereto.

Section 1(9) of the Bankruptcy Act defines "court" as meaning "judge" or "referee" [of a U. S. District Court].

Even Vaughan concedes, as he must, that he *could* have consented to the summary jurisdiction of the court, but takes the positions (i) that the filing of a proof of claim does not constitute consent; (ii) that it is necessary for such consent to be of an affirmative nature; and (iii) that he did not so consent. (Point III of Brief in Support, pages 36-38.)

Respondent concedes that petitioner never affirmatively consented to summary jurisdiction. It is respondent's posi-

tion (i) that the filing by a supposed creditor of a claim in bankruptcy proceedings constitutes consent to the summary jurisdiction of the court, by a judge or referee, to determine a counterclaim arising out of the same subject matter as the claim, and to the entry of an affirmative money judgment on the counterclaim in favor of the bankrupt estate; and (ii) that in any event such supposed creditor's proceeding on the merits of the counterclaim without objection until after the court has reached and announced its decision does constitute such consent, although formal judgment may not have been entered.

B. *Consent by Filing Claims.*

It is to be noted in the instant case that, as allowed by the Referee, the Trustee's counterclaim arose out of the same subject matter as petitioner's major claim. Petitioner himself put before the Referee the question of how much was owed him for attorney's fees, and should not now be heard to complain when the Referee found he had already been paid too much.

The principal case holding that the filing of a claim by a creditor constitutes consent to summary jurisdiction to enter a judgment on a counterclaim thereto is *Alexander v. Hillman*, 296 U. S. 222 (1935). While that case arose out of a receivership in equity, there would seem to be no valid distinction between that and a bankruptcy proceeding in this connection.

Other cases holding that filing a claim constitutes consent to summary jurisdiction to enter a judgment on a counterclaim are:

In re Solar Mfg. Co., — F. 2d — (C. A. 3, December 3, 1952) affirming 102 F. Supp. 859 (D. C., N. J., 1952);

Columbia Foundry Co. v. Lochner, 179 F. 2d 630, 14 A. L. R. 2d 1349 (C. A. 4, 1950);

Chase National Bank v. Lyford, 147 F. 2d 273 (C. C. A. 2, 1945);

In re Park Beach Hotel Bldg. Corp., 96 F. 2d 886 (C. C. A. 7, 1938); cert. den. sub nom. *Pancoe v. Southam*, 305 U. S. 638 (1938);
Florance v. Kresge, 93 F. 2d 784 (C. C. A. 4, 1938);
In re Nathan, 98 F. Supp. 686 (D. C., S. D. Calif., 1951);
In re Gillespie Tire Co., 54 F. Supp. 336 (D. C., W. D. S. Car., 1942).

In re Nathan, supra, contains an exhaustive review of all of the cases relevant to the subject.

See also:

In re Monongahela Rye Liquors, Inc., 141 F. 2d 864 (C. C. A. 3, 1944);
Giffin v. Vought, 175 F. 2d 186 (C. A. 2, 1949);
Oglebay, "Some Developments in Bankruptcy Law Regarding Summary Jurisdiction and the Determination and Effect of Discharges" (1946) 21 J. of Nat'l. Ass'n. of Ref. 18, 19;
2 *Collier on Bankruptcy*, (14th ed.) par. 23.08[6], pages 530-532;
4 *Collier on Bankruptcy*, (14th ed.) par. 68.20, pages 785-790.

C. *Consent by Proceeding on the Merits.*

Even if simply filing a proof of claim is not sufficient, proceeding on the merits of the counterclaim without objection until just before entry of a judgment on the announced decision of the court of bankruptcy constitutes consent to its summary jurisdiction to make such determination.

The point is that if the "mere" filing of a claim is not enough to show general consent, as is indicated by some of the earlier cases cited in 2 *Collier on Bankruptcy* (14th ed.) par. 23.08[6], page 530, then the proceeding by peti-

tioner on the merits provides the "further" consent there mentioned and, in par. 23.08[4], page 523, defined.

Because the counterclaim arose out of the same transaction as one of the claims, the trustee was *compelled* to assert it under Rule 13(a) of the Federal Rules of Civil Procedure, which must be followed if "not inconsistent" with the Bankruptcy Act (General Order 37).

Indeed, a claimant himself must expressly tender the issue by alleging in his proof of claim that "there are no set-offs or counterclaims to said debt". See General Order 38 and Official Forms 28, 29, 30, and 31.

In the instant case, no objection was made by claimant at any time or in any way until after the Referee had announced his decision against petitioner (R. 56-57) by filing his findings of fact, conclusions of law, and opinion (R. 41-56).

Petitioner says that at an argument held April 26, 1950, he "orally in open Court adopted the protest of the attorney for the bankrupt also as his position" (Brief in Support, page 37). If this be true, it is not of record, and neither respondent's trustee nor the latter's attorney have any recollection or record thereof. Furthermore, even if made, such statements at an oral argument would be no more part of the record than briefs would be.

The attorney for the bankrupt[1] filed a supplemental memorandum on May 9, 1950, in which the jurisdictional point was discussed (Brief in Support, page 37) but petitioner, who wrote a letter dated May 8, 1950, to the Referee in lieu of a brief, devoted his arguments exclusively to the merits and failed even to mention or refer to the jurisdictional point.

---

1. The reference made by the Referee (R. 55) to the objection made by the "attorney for bankrupt" confused the District Judge (R. 73). The Referee was referring to the attorney for the debtor who prepared and filed the petition in bankruptcy, and not to the attorney for the trustee who prepared, filed, and prosecuted, the set-off and counterclaim.

Petitioner's formal protest (R. 56), his petition for rehearing addressed to the Referee (not printed), and his petition for review addressed to the District Judge (R. 60), all are silent as to any such objection. The contention was first made in the Court of Appeals.

At pages 16 and 20 of the petition and at page 32 of the Brief in Support the charge is made and repeated twice that on November 1, 1949, petitioner left with the Trustee "a draft of proposed response to his Set-off and Counterclaim, denominated 'answer' denying its unsupported statements and setting forth facts in support of the denials (R. 36-39)" and that "on the same day, November 1, 1949, the Trustee filed petitioner's said proposed response with the Referee and without authority".

This charge has never before been made and is absolutely false. There is no justification for the statement anywhere.

Petitioner does not state what he deems the significance of his charge to be if true, and respondent can only guess that petitioner intends to urge that the filing of this pleading should not be considered as a factor indicating consent to summary jurisdiction.

Quite apart from the fact that petitioner did indeed file this pleading, at various points in his briefs and arguments below on the merits, petitioner has referred to it and has relied on the exhibit attached to it, the claimed letter of resignation of April 2, 1942, which appears nowhere else in the record (R. 47). Indeed, petitioner has cited this pleading in the instant petition in support of his assertions at pages 4, 6 (five times), 7, 9, and 19.

Petitioner does not even now disown this pleading, nor at any time has he attempted to amend, supplement, or withdraw, it. He was *required* to file a responsive pleading under Rules 7(a) and 12(a) of the Federal Rules of Civil Procedure.

At page 32 of the Brief in Support, petitioner puts quotation marks around the words "by William M. Duffy,

Jr., the Trustee Herein" which follow the words "filed with the Referee", without giving a reference to what he is quoting and as an apparent make-weight to his assertion that this "draft" of an "answer" was filed by the Trustee with the Referee without authority from petitioner.

Examination of the instrument itself (R. 36) shows that it was not denominated simply "Answer" as stated by petitioner, but was, instead, denominated "Answer to the 'Set-off and Counterclaim to Claims of James A. Vaughan' Filed by William M. Duffy, Jr., Trustee Herein". The denomination also is quoted in the Referee's opinion on petitioner's protest (R. 58).

Petitioner apparently has mistaken the name he gave his own document for a clerk's endorsement, and the words "filed by William M. Duffy, Jr." refer to the Trustee's Set-off and Counterclaim, and not to petitioner's pleading in response thereto.

II. There Is No Conflict of Decisions.

The only case which has been really seriously urged by petitioner as conflicting with the holding of the courts below, is *Cline v. Kaplan,* 323 U. S. 97 (1944). However, that case is clearly distinguishable, and was distinguished both by the Referee (R. 58-59) and by the District Judge (R. 68-69), as involving a turn-over order against a third party who had not filed a claim except to resist the order, in which the *trustee,* rather than the claimant, *first* invoked the court's jurisdiction. See 2 *Collier on Bankruptcy* (14th ed.) par. 23.08[5], pages 528-530.

The District Judge pointed out (R. 73) that Sec. 23 of the Bankruptcy Act (under which the requirement of consent arises) applies only to "suits by the receiver and the trustee", and cited *Ex Parte Baldwin,* 291 U. S. 610, 617 (1934).

Cline v. Kaplan, supra, has been rendered obsolete by Act of July 7, 1952, Sec. 2(b), 66 Stat. 420 (Appendix, infra, page 19). The committee reports show beyond question that this was the specific purpose of the amendment, for *Cline v. Kaplan* is referred to by name and citation. (Appendix, infra, pages 20, 22.)

Cline v. Kaplan, supra, is described as a "defect", as having "unsettled sound procedure", and as having created "an unsatisfactory situation", which "the proposed amendment is intended to overcome". (Appendix, infra, pages 20-23.)

Petitioner has not pointed out any supposedly conflicting decision other than turn-over or other third-party-claimant cases of which *Cline v. Kaplan, supra,* is the prototype.

It is submitted that there is no conflicting decision and that, even assuming that this case conflicted in principle with *Cline v. Kaplan, supra,* there is no reason for this Court to grant the petition to resolve such conflict because of the amendment to Section 2a(7) of the Bankruptcy Act previously referred to, which has established a statutory rule fully harmonious with that applied in this case and which expressed Congressional disapproval of the rule stated in *Cline v. Kaplan, supra.*

III. There Is No Important Question of Federal Law.

A. *Petitioner's Questions 1, 2, and 3, Are Based on False Premises.*

Petitioner's supposed questions 1, 2, and 3, are based on the false premises that the Trustee sought authority from the Referee to begin proceedings against petitioner for restitution of payments made to him, and that the Referee made some ruling or determination that he did not have jurisdiction to determine the claims between the Trustee and petitioner.

Petitioner attempts to justify his premises by creating through quotations out of context an elaborate fabrication and distortion of what took place at an adjourned first meeting of creditors held January 19, 1949.

This is done at pages 13 through 15 of the petition. Respondent has set out at R. 79-92 the context which petitioner ignores.

This attempt by petitioner is not new. He has made similar attempts in the courts below. The first attempt was in an affidavit filed September 27, 1950, in connection with his petition for rehearing, in which some of the identical statements of the Referee set forth in the instant petition are quoted. With respect thereto the Referee found in his memorandum and order refusing petition for rehearing (R. 102):

> "Mr. Vaughan has confused the record. The matters that were before me on the dates mentioned in claimant's affidavit did not pertain to the issue created by the Trustee's counterclaim and set-off. The record shows that on November 19, 1948, Mr. Vaughan filed his two claims. The Trustee filed his objection to the claim for compensation on August 25, 1949, and the set-off and counterclaim on October 3, 1949. It must be obvious, therefore, that what is referred to on pages 3 and 4 of claimant's affidavit had nothing to do with the counterclaim filed some ten months later."

At the very outset of the adjourned first meeting of creditors held January 19, 1949, the Referee stated the nature and purpose thereof, and its agenda. He said (R. 80):

> "This is the adjourned first meeting of creditors; this is not an accounting; we are only interested in those things which have to do with the first meeting of creditors, and that is an examination of the bankrupt for the purpose of discovering any unlisted assets or

showing that any of the liabilities which are listed are not proper, or to point out any assets or any possible source of funds of the bankrupt for the protection of creditors."

All of the remarks quoted or cited by petitioner are extensions of, or reminders of, the limited scope of the meeting, and the jurisdiction to which he was referring (the Referee did not use that word) was relative to what could be done *at a first meeting of creditors,* and not what could be done by a court of bankruptcy.

Meetings of creditors are provided for by Section 55 of the Bankruptcy Act. Sub-section (b) thereof provides that the "judge or referee" shall *preside* at the first meeting of creditors. It does not seem reasonable that petitioner should claim that the jurisdiction of the court of bankruptcy can be foreclosed because of the efforts of the Referee to keep the first meeting of creditors within its proper agenda.

Furthermore, the result of the meeting was *not* a ruling that there was no basis for further proceedings against petitioner, as petitioner seems to imply, because the Referee's stated conclusion was that (R. 91):

> "I think it is important that you brought this out, and I think there may come a time when Mr. Vaughan and associates would have to make a further and more full explanation on this. I can look at this as a possible asset."

B. *Petitioner's Question 6 Is Based on a False Implication.*

Petitioner's supposed question 6 is premised on a false implication that the question here involved has been previously decided by another court adverse to the Trustee.

This is stated more specifically in his Brief in Support at pages 34-36, but the fallacy is that nowhere in the Dickinson-Rinke litigation was any adjudication made as to

whether it was proper for petitioner *to accept a fee* for legal services from bankrupt.

Vaughan implies that somewhere along the line there has been some holding that he did not occupy or hold an adverse position. This over-strains credulity, for there is no question (i) that Vaughan intervened in the Dickinson-Rinke litigation individually and representng the Rinke Agency subscribers, (ii) that he appeared as attorney of record for the intervenors, and (iii) that the judgment was awarded to the intervenors.

Vaughan's explanation is that his motive was pure: To avoid the possibility that Dickinson would escape liability for his wrongdoing for lack of the proper party to receive judgment. The implication also is made that advice of counsel is a factor.

On the question of advice of counsel, the Referee said in his memorandum on petitioner's petition for rehearing (R. 101):

> "I found nothing in the record indicating that Judge Vanderbilt advised Mr. Vaughan that he should be the one to represent these subscribers and that Petroleum Conversion Corp. should finance their litigation against Mr. Dickinson. No one can quarrel with the general advice that the agency subscribers should be represented in the Dickinson Litigation; the entire issue which confronted the Referee was Mr. Vaughan's interest into the litigation in a position adverse to Petroleum Conversion Corp. and litigating the issue at the expense of that corporation; particularly when he did not satisfactorily prove that he rendered other services to the corporation than what were involved in the litigation. That is the nub of this case and claimant seems unable to comprehend that it was not only unethical for him to assume and continue in this adverse situation, but that it was improper under those circumstances for him to pay himself for services to the cor-

poration where such services seemed so closely allied to and grew out of this Dickinson-Rinke litigation."

On the question of whether his interests were adverse:

¶ At page 6 of the petition Vaughan says that on April 2, 1942, he "resigned all official connections with Petroleum".

The facts are: (i) that Vaughan stated he resigned as Director and Vice President of PCC, but in his supposed letter of resignation he did not even purport to resign as *attorney* for PCC (R. 40, 47); (ii) that the supposed letter of resignation of April 2, 1942, does not appear in nor is it referred to at any portion of the PCC corporate minutes or in any other records that were offered in evidence (R. 47); and (iii) that Vaughan never explained when and under what circumstances he again "became" a director after allegedly resigning on April 2, 1942 (R. 51).

¶ At page 6 of the petition Vaughan says that his intervention was with the full knowledge and approval of PCC's Board and numerous of its stockholders.

The fact is that neither the directors nor the stockholders of PCC ever consented by appropriate corporate action to Vaughan's representation of an interest adverse to PCC in the Dickinson-Rinke litigation (R. 48).

This point is discussed at some length in the Referee's memorandum and order refusing petition for rehearing, particularly at R. 98-100, where the Referee discusses the law relating to ratification by directors of self-dealing.

The Referee also found as a fact that after Vaughan became the active head of PCC in 1944 he "controlled the policies and activities of its Board of Directors" (R. 49).

¶ At page 7 of the petition Vaughan says that at a meeting of PCC's Board of Directors held June 10, 1943, the Board proposed to elect Vaughan a Vice President "for accommodation signature purposes" and that "protesting" such action Vaughan "reminded the members of the Board of his prior resignation of April 2, 1942."

The facts are (i) that nothing is said in the minutes about the purpose for which Vaughan was to be elected Vice President; (ii) that Vaughan's remarks could not possibly be construed as a "protest" against his election (R. 22-23); and (iii) that within a few months subsequent thereto Vaughan became the active head of PCC (R. 26-27, 49) to such an extent that effective February 1, 1944, he was put on a salary basis of $250 per month on the basis of Vaughan's statement to PCC's Executive Committee that "over the past several months" he had devoted an "extraordinary amount of time" to the affairs of PCC in addition to the time required for legal services (R. 50).

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

THOMAS COOCH,
Counsel for Respondent,
CONNOLLY, COOCH & BOVE,
Delaware Trust Building,
Wilmington 1, Delaware.

January 2, 1953.